BEFORE THE FEDERAL ELECTION COMMISSION

SENSITIVE

In the Matter of	)	
	)	
	)	
Huckabee Election Committee (U.S. Senate)	)	MUR 4317 and MUR 4323
Prissy Hickerson, as treasurer	)	
Huckabee Election Committee	)	
Prissy Hickerson, as treasurer	)	
The Honorable Mike Huckabee	)	

GENERAL COUNSEL'S REPORT

I. BACKGROUND

On October 16, 1996, the Commission found reason to believe in MUR 4317 that the Huckabee Election Committee (U.S. Senate) ("the Senate Committee") and Prissy Hickerson, as treasurer, had violated 2 U.S.C. §§ 434(b)(3)(A) and 441b. On the same date the Commission found reason to believe in MUR 4323 that the Senate Committee and Prissy Hickerson, as treasurer, had violated 2 U.S.C. §§ 434(b)(3)(A) and 441b; that the Huckabee Election Committee ("the State Committee") and Prissy Hickerson, as treasurer, had violated 2 U.S.C. § 441b; and that the Honorable Mike Huckabee had violated 2 U.S.C. § 441b. Both of these matters were generated by complaints.

On November 29, 1998, counsel for all respondents were provided with a General Counsel's Brief, which addresses both enforcement matters and which is incorporated herein by reference.

II. ANALYSIS

On December 28, 1998, following receipt of an extension of time to respond, counsel submitted a Response to the General Counsel's Brief. The following is a discussion of the issues addressed in each of the two matters in light of the responsive brief, plus recommendations for Commission action.

A. MUR 4317 - Receipt of Corporate Contribution

The General Counsel's Brief discusses the receipt by the Senate Committee of a $1,000 contribution from Delta Beverage Group, Inc. This contribution was refunded by the Senate Committee more than six months after it was received, and thus not within the thirty day period provided at 11 C.F.R. § 103.3(b)(1).

The Senate Committee has admitted the receipt of this contribution, but contends that it believed at the time of receipt that the contribution was from a political action committee.[1] On this basis counsel argues in the response brief that the appropriate regulatory provision is 11 C.F.R. § 103.3(b)(2). This provision provides for situations in which there is no initial indication that a contribution is from an illegal source, but in which, at a later date, information is received to this effect; in such instances the regulation provides that a refund should take place within thirty days of the date the illegality was discovered. 11 C.F.R. § 103.3(b)(1), by contrast, covers situations in which questions about the legality of a contribution arise when the contribution is first received, e.g., there is something on the face

[1] The brief submitted on behalf of the respondents asserts that this same statement in the General Counsel's Brief constitutes a concession on the part of this Office as to the Committee's belief. The statement in the Brief was in fact simply a restatement of the Committee's own contention; this Office expressed no position as to this defense.

of the instrument which presents "genuine questions as to whether [it was] made by [a] corporation . . . ."

Respondents have not provided the exact date on which the error was discovered with regard to the Delta Beverage contribution; rather, counsel has stated that it was "several months later." The refund to Delta Beverage was dated March 1, 1996, the same day that the complaint in this matter was filed. More importantly, the Senate Committee's initial itemization of the receipt of this contribution in its 1995 Year End Report cited "Delta Beverage Group Inc." as the contributor, not a Delta Beverage Group political action committee. Therefore, it appears that 11 C.F.R. § 103.3(b)(1) remains the appropriate regulatory provision to be applied, and that the Senate Committee failed to meet the requirements of this provision in that it did not refund the corporate contribution until long after the thirty-day period permitted. Therefore, this Office recommends that the Commission find probable cause to believe that the Senate Committee violated 2 U.S.C. § 441b.

B. MUR 4317 - Misreporting of Two Contributions

This matter also involves the misreporting by the Senate Committee of two $500 contributions received from partnerships, Fort Smith Coca Cola Bottling Co. and Hudson, Cisne, Keeling-Culp and Co. The original reporting of these contributions was correct; however, in each instance the contribution was re-itemized in an amended 1995 Year End Report as having come from a partner, not from the partnership itself.[2] The Senate

[2] The responsive brief states: "The General Counsel's Brief concedes that the so-called 'mis-reporting' occurred due to the Committee's receipt of incorrect information from the contributors." The General Counsel's Brief in fact stated: "The Senate Committee admits the reporting errors at issue, but cites 'incorrect' information received from the contributors as the result of inquiries made by the committee which it then included in

Committee asserts that, while the report as amended was incorrect, this constituted "unintentional" misreporting based upon information received from the contributors.

This Office has not contended that the misreporting here at issue was intentional, nor has the Commission made findings that the misreporting was knowing and willful. The Senate Committee's correspondence with the Commission regarding these contributions reveals what appears to have been confusion about the Coca Cola Bottling Co. contribution, in that the cover letter to the amended report stated that the contribution was from a partnership, not a political action committee as originally believed, but the amended report changed the itemized contributor from the partnership to a specific partner. The cover letter accompanying the revision of the Hudson, Cisne itemization stated, "We have learned that a contribution which we listed as being from a partnership was actually from an individual partner." Nonetheless, the effect of the incorrect amendments to the Committee's reports has been the placement of misleading information on the public record which has never been corrected. Therefore, this Office recommends that the Commission find probable cause to believe that the Senate Committee violated 2 U.S.C § 434(b)(3)(A) with regard to this misreporting of the two contributions.

C. MUR 4323 - Best Efforts

2 U.S.C. § 434(b)(3)(A) requires that political committees include in their reports the identification of all persons who have made contributions to the reporting committee in excess of $200. 2 U.S.C. § 431(13) defines "identification" of individuals as meaning "the name, the

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(Footnote 1 continued).
amendments to its reports." The General Counsel's Brief did not comment on this defense.

mailing address, and the occupation of such individual, as well as the name of his or her employer . . . ." 11 C.F.R. §.104.7(b)(1) provides that, in order for a committee to show that it has exerted its "best efforts" to obtain and report the information required by the statute, "[a] written solicitation for contributions [must] include a clear request for the contributor's full name, mailing address, occupation and name of employer," and a statement of the requirements of federal law in this regard.

The complaint in MUR 4323 alleged that the Senate Committee failed to identify the occupations of 44 itemized contributors on its 1995 Year End Report, and that there was "no evidence that Huckabee or his campaign had complied with the Commission's 'best efforts' requirements."[3] The Senate Committee, before and after the Commission's finding of reason to believe, provided copies of two form letters which requested the missing information and which were assertedly sent to the relevant contributors. Although these form letters are not dated, and thus do not indicate how soon after receipt of the contributions they were mailed, i.e., whether they were sent within thirty days of receipt of the contributions as required by 11 C.F.R. § 104.7(b)(2), the Committee has amended its 1995 Year End Report twice, in April and May, 1996, to supply missing contributor information and thereby has reduced the percentage of contributors for whom information is missing from 16.2% to 11.5%. Given the apparent mailing of follow-up letters, and the reduction in the Committee's failure rate, this Office recommends that the Commission take no further action with regard to a violation by

[3] The General Counsel's Brief does not discuss this issue because the anticipated recommendation to the Commission was to take no further action.

the Senate Committee of 2 U.S.C. § 434(b)(3)(A) involving the identification of itemized contributors.

D. MUR 4323 - Testing the Waters Expenditures by the State Committee

11 C.F.R. § 100.8(b)(1) sets out one of several exceptions to the definition of "expenditure" for purposes of the Federal Election Campaign Act ("the Act") and of the Commission's regulations. This exception covers "[p]ayments made solely for the purpose of determining whether an individual should become a candidate. . . ." Since 1977, 11 C.F.R. § 106.3(b)(1) has stated: "Travel expenses paid for by a candidate from personal funds, or from a source other than a political committee, shall constitute reportable expenditures if the travel is campaign-related." 11 C.F.R § 106.3(b)(2) provides: "Where a candidate's trip involves both campaign-related and non-campaign-related stops, the expenditures allocable for campaign purposes are reportable . . . ." 11 C.F.R. § 106.3(b)(3) states: "Where a candidate conducts any campaign-related activity in a stop, the stop is a campaign-related stop and travel expenditures made are reportable."

The Commission's Explanation and Justification for Regulations on Payments Received for Testing the Waters, dated March 13, 1985, which addressed revisions of 11 C.F.R. § 100.8(b)(1), states:

> The current 'testing the waters' regulations are explicitly limited 'solely' to activities designed to evaluate a potential candidacy. Examples of permissible activities included in the present regulations are expenses for conducting a poll, telephone calls, and travel, to determine whether an individual should become a candidate.
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> Despite its attempts to limit the scope of the 'testing the waters' exception, the Commission has concluded that the present rules could be interpreted to include activities beyond those they

> were originally intended to encompass. The Commission has, therefore, amended the rules to ensure that the 'testing the waters' exemptions will not be extended beyond their original purpose. (Emphases added.)

The Explanation and Justification then went on to discuss the amendments to this regulation, which expanded upon the examples of activities which would be considered campaign-related and not "testing the waters." 50 Fed. Reg. 9993 (1985)(amended regulations effective July 1, 1985).

Arkansas state law permits contributions by corporations, banks and labor organizations to candidates for state office of up to $1,000 per election. Thus, the Commission found reason to believe that the Senate Committee, the State Committee and the Honorable Mike Huckabee violated 2 U.S.C. § 441b as the result of apparent in-kind contributions made by the State Committee to the Senate Committee; these in-kind contributions resulted from State Committee payments for a mailing and for a trip to Washington, DC made by Mr. Huckabee and his assistant, Brenda Turner, each of which set of expenditures was allocable in part to Mr. Huckabee's eventual Senate campaign.

1. Letter and Questionnaire

As discussed in the General Counsel's Brief, in May, 1995, the State Committee sent out a fundraising letter designed to raise monies to repay debts left from Mr. Huckabee's 1994 campaign for the office of Lieutenant Governor of Arkansas. The letter also enclosed and referred to survey covering a number of issues; one question asked whether or not Mr. Huckabee should run for the U.S. Senate in 1996. It is the position of this Office that this question converted the mailing in part into a testing the waters expenditure on behalf of a possible Senate campaign, and that certain other portions of the survey would also have been

in part beneficial to a federal campaign. The result was that, once Mr. Huckabee became a candidate for the Senate, the costs of the entire mailing became allocable between the State Committee and the Senate Committee, with the Senate Committee portion having become an in-kind contribution from the State Committee.

In the response brief, counsel for the respondents state: "The [General Counsel's] Brief does not dispute that the purpose of the questionnaire was to allow then-Lietuenant Governor Huckabee to gauge his constituents' views on a number of issues relevant to the State's citizens at the time." (Emphasis added.) This Office does not disagree; however, one of the issues raised with the constitutents receiving the letter and survey was whether Mr. Huckabee should become a candidate for the United States Senate. Later, the response brief states: "Factually, no one disputes the purpose of the activity was not testing the waters." On the contrary, it is the position of the Office of General Counsel that one of the purposes of the State Committee activity at issue was the testing of the waters for a Senate race.

A basic premise of counsels' argument appears to be that an activity must be deemed to have been either entirely for purposes of testing the waters or not at all. The phrase "solely for the purpose" is included in the language of 11 C.F.R. § 100.8(b)(1) and is cited by counsel in the response brief. However, as was explained in the Commission's Explanation and Justification for this regulation quoted above on page 6, the term "solely" is employed in the regulation in a discussion of the limited categories of activity to be included with the testing the waters exception created by this provision. There is no concept in the E & J that an activity such as a mailing can have only one purpose or that an initial purpose would remain unmodified no matter what language is used or what related activities may take place.

In the response brief, counsel also state: "The General Counsel asserts that language contained in a portion of one question of the issues survey converts the entire mailing to testing the waters as a matter of law." This statement is incorrect as a summary of the General Counsel's position. First, this Office has from the beginning of this matter recognized that the mailing at issue served both federal and non-federal purposes. The federal purpose is, to be sure, most clearly found in the survey question which read:

> There has been much speculation about the open U.S. Senate seat which will be vacated in 1996 by Senator David Pryor. Do you think I should consider running for that office? Would you be willing to support the campaign if I ran?

However, certain other questions in the survey also addressed issues with both state and federal implications, e.g., welfare reform and highway taxes, albeit less directly. And, as noted in the General Counsel's Brief, the accompanying fundraising letter expressly encouraged responses to the survey. Based upon the contents of the letter and survey, with the survey's combination of express and implicit federal and non-federal purposes, this Office has allocated the $2,824.83 in costs for the mailing between the two committees, resulting in an allocation of $1,412 to the Senate campaign and a corresponding in-kind contribution from the State Committee.

This Office recommends that the Commission find probable cause to believe that the Senate Committee and the State Committee each violated 2 U.S.C § 441b by respectively accepting and making an in-kind contribution in the form of a portion of the costs of the letter and survey.

2. Trip to Washington, DC

The General Counsel's Brief also discusses the nature and costs of a trip made to Washington, DC by Mr. Huckabee and his assistant, Brenda Turner, on August 1-3, 1995. The costs of the trip totaled at least $2,161. As stated in the General Counsel's Brief, the trip involved both a consultation about a 1994 state campaign-related debt and visits by Mr. Huckabee with national party representatives, including leadership of the National Republican Senatorial Committee.

The response brief states inaccurately: "The General Counsel's Brief does not dispute that the Washington, D.C. trip at issue 'was for the sole purpose of meeting with political consultant Richard Morris to discuss an outstanding debt for services provided during the 1994 Lt. Governor's race.'" The General Counsel's Brief in fact sets out the foregoing sentence as an assertion by respondents, and then goes on to state: "The August, 1995 trip to Washington, DC apparently involved, in part, a consultation about a 1994 debt; this fact suggests that a portion of the costs of the trip was legitimately allocated to non-federal activity. (Emphases added.)

The General Counsel's Brief, however, then goes on to set out certain other factors which point to more than debt reduction discussions as components of the trip. The Brief discusses these factors, beginning with the visits by Mr. Huckabee with national party representatives listed by Brenda Turner in her affidavit which accompanied the response to the complaint, including the above-cited visit with representatives of the National Republican Senatorial Committee. The Brief also notes the Respondents' acknowledgment, in the response filed after the Commission found reason to believe, that Mr. Huckabee had been "asked [during this trip] informally . . . about the open U.S. Senate seat in Arkansas . . . ."

The Brief further cites Mr. Huckabee's registration of his exploratory committee for a U.S. Senate campaign one week after he returned to Arkansas from the Washington trip. The Brief then concludes that a portion of the Washington, DC trip should have been allocated to federal election activity.

Counsel in the response brief discusses what is termed "the purpose of the trip" to Washington, DC. (Emphasis added.) The Commission's regulations, however, have always assumed that a trip can have more than one purpose, and that purposes can change and the need for allocation of expenditures arise as circumstances change. As early as 1977, the Commission's Explanation and Justification for proposed disclosure regulations stated with regard to 11 C.F.R. § 106.3:

> A candidate's campaign-related travel is reportable, no matter who pays for it. Where a candidate makes one campaign-related appearance in a city, the trip to that city is considered campaign-related. Incidental contacts on an otherwise non-campaign stop do not make the stop campaign-related. For example, if a candidate makes a non-political speech to a civic association luncheon, and on the way out chats with a few attendees about his upcoming campaign, that conversation would not convert the appearance into a campaign-related event. However, if during the course of the speech the candidate asks for support, that would convert an otherwise non-campaign event into one which is campaign-related, and would require that travel costs be allocated, and reported as expenditures.

"Explanation and Justification of the Disclosure Regulations, Parts 100-108," Federal Election Regulations: Communication from the Chairman, Federal Election Commission, Jan. 11, 1977, H.R. Doc. No. 95-11, page 50. The relevant language of 11 C.F.R. § 106.3(b) has not changed since this explanation was written.

This Office recommends that the Commission find probable cause to believe that the Senate Committee and the State Committee violated 2 U.S.C. § 441b as a result of

expenditures made by the State Committee for the Washington, DC trip which were allocable in part to the Senate Committee. Given the candidate's direct involvement in this activity, this Office also recommends that the Commission find probable cause to believe that the Honorable Mike Huckabee violated 2 U.S.C. § 441b in this regard.

3. Other Activities

As discussed in the General Counsel's Brief, the investigation in this matter has revealed possibilities of other testing the waters activity on the part of the State Committee during the summer of 1995, such as a discussion of a possible Senate race by Mr. Huckabee at an event in Bismarck, Arkansas on June 24, 1995, and a letter sent to Republican leaders within Arkansas in May, 1995, seeking support for a Senate candidacy. It appears that the costs of these activities were met by the State Committee. It also appears, however, that these costs would have been relatively minimal and thus would not warrant further pursuit by the Commission.[4]

III. DISCUSSION OF CONCILIATION AGREEMENT AND CIVIL PENALTY

[4] Again, counsel in the response brief cites a quotation in the General Counsel's Brief of language included in the State Committee's answers to questions posed by this Office regarding Mr. Huckabee's intra-state trips, and states inaccurately that the same quotation constituted a conclusion by this Office that none of the events Mr. Huckabee attended on these trips were "fundraisers or federal campaign-related events." This Office reached no such conclusion in its Brief.

IV. RECOMMENDATIONS

1. Find probable cause to believe in MUR 4317 that the Huckabee Election Committee (U.S. Senate) and Prissy Hickerson, as treasurer, violated 2 U.S.C. § 441b.

2. Find probable cause to believe in MUR 4317 that the Huckabee Election Committee (U.S. Senate) and Prissy Hickerson, as treasurer, violated 2 U.S.C. § 434(b)(3)(A).

3. Find probable cause to believe in MUR 4323 that the Huckabee Election Committee (U.S. Senate) and Prissy Hickerson, as treasurer, the Huckabee Election Committee and Prissy Hickerson, as treasurer, and The Honorable Mike Huckabee violated 2 U.S.C. § 441b.

4. Approve the attached conciliation agreement.

5. Approve the appropriate letter.

3/19/99
Date

Lawrence M. Noble
General Counsel

Attachment

Conciliation Agreement

Staff Assigned: Anne A. Weissenborn